No. 10393.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH BENJAMIN EDWARDS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

FEB - 5 1944

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APPELLEE'S BRIEF.

Jurisdiction.

This case was tried in the United States District Court in and for the Southern District of California, upon whom jurisdiction was conferred by Section 41(2) of Title 28 of the United States Code. This Court has appellate jurisdiction under the provisions of Section 225(a) of Title 28 of the United States Code to review the judgment of the District Court.

Statement of Case.

Appellant has substantially stated the case in his Opening Brief, to which appellee will add the following:

Not until March 5, 1943, after defendant had been classified 4-E (conscientious objector) on February 16,

1942, by the Appeal Board, and after he had been ordered entrained on June 1, 1942, did he attempt to submit proof to his local board that he was a full time "Pioneer." [R. 23.] Appellant's statement on page 2 (second paragraph) of his brief does not make the time element clear.

In the ensuing paragraph, appellant states that at the trial appellant claimed that he had not received a fair hearing before his local board or the Selective Agencies. Nowhere in his direct testimony [R. 22-26] did the defendant himself so testify or so claim, although in the recross-examination of the defendant by the Government attorney, the Court did not permit the defendant to answer the question: "Do you think that you did not have a fair hearing?"

Question Involved.

Appellant has stated the question involved as follows:

> May a defendant charged with a violation of the Selective Training and Service Act assert as a defense to a criminal prosecution for failure to comply with an order of a local draft board, that the order which he is charged with having violated was unlawful because it was arbitrary or capricious, without evidentiary support, *or without a hearing?* (Emphasis supplied.)

The record does not disclose that the appellant was denied a hearing.

Appellant's argument is presented under three heads, as follows:

> I. Determinations of Local Selective Service Boards Are Subject to Judicial Review, if Such De-

cisions Abridge Due Process, Are Made Upon the Denial of a Fair Hearing, Are Unsupported by Evidence or Arbitrary or Capricious, or Violate Law.

II. The Selective Service System Is an Administrative and Quasi-Judicial System, and Therefore Is Governed by the Law Governing Judicial Review of Administrative or Quasi-Judicial Bodies.

III. It Is the Accepted Administrative Law Rule That, as a Defense to a Criminal Prosecution for Violation of an Order of an Administrative Board, the Validity of the Board's Order May Be Challenged, Particularly Where the Board Has Offended the Rudimentary Demands of Justice Incorporated in the Concept "Due Process."

We believe appellant's argument is conclusively answered by the recent decision of the Supreme Court of the United States in the case of *Nick Falbo, Petitioner, v. The United States of America,* No. 73, October Term 1943, decided January 3, 1944. This case is determinative of similar issues as are involved in the case before this Court.

We rely on the law in the *Falbo* case, as expressed by Justice Black, as follows:

> Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal

prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

We think it has not. The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded "a prompt and unhesitating obedience to orders" issued in that process "indispensable to the complete attainment of the object" of national defense. Martin v. Mott, 25 U. S. 19, 30. Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so.

Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made.

This would appear to answer completely all the questions and arguments raised by appellant.

Conclusion.

Now that the Supreme Court has spoken, it is respectfully urged that the appellant has no recourse to the courts and no right of judicial review unless and until he has complied with all orders of the local draft board, in this instance, to have reported himself for transportation to a conscientious objector's camp in compliance with the order of the draft board.

Respectfully submitted,

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